

FILE COPY

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1946

—  
No. 239  
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DAN S. MARTIN, JR.,  
*Petitioner,*

vs.

ESTHER R. WAGNER, AS EXECUTRIX OF THE  
ESTATE OF ZOE R. MARTIN, DECEASED,  
JOHN D. MARTIN AND DAN S. MARTIN, SR.

—  
ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF ALABAMA

—  
BRIEF OF RESPONDENT, MRS. ESTHER R.  
WAGNER, AS EXECUTRIX OF THE ESTATE  
OF ZOE R. MARTIN, DECEASED, AND  
INDIVIDUALLY.

✓  
—  
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SMYER & SMYER

LANGE, SIMPSON, ROBINSON &  
SOMERVILLE

*Of Counsel.*

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OPINIONS BELOW

The Probate Court of Jefferson County, Alabama, entered a final order and decree (R. 12) without an opinion. The order is not reported.

The opinion of the Supreme Court of Alabama (R. 18-23) has not been officially reported, but such opinion may be found in 25 So (2d) 409.

## STATEMENT OF THE CASE

The order of the Probate Court of Jefferson County, Alabama, of which the Petitioner complains, is dated March 30, 1945, and is set out on page 12 of the Record. The first ruling in the order is one denying the Petitioner's motion to continue the hearing of the cause until three months after the termination of the services of the Petitioner in the army.

The second part of the order is one sustaining the demurrers of the Respondent, Mrs. Esther R. Wagner, to the Petition to Probate the alleged lost will.

The final portion of the order contains a dismissal of the Petition to Probate upon a statement by the Probate Court that the Attorney for the Petitioner in open Court had declined to plead or proceed further in the case.

The original Petition to Probate the alleged lost will was filed January 15, 1945, as shown by the order setting the matter for hearing (R. 5). By order of February 16, 1945, the hearing was continued until February 23, 1945. (R. 6).

The respondent, Mrs. Esther Wagner as Executrix of the estate of Zoe R. Martin, deceased, and in her individual capacity (evidently as a distributee of the estate of Mrs. Zoe R. Martin), filed a demurrer to the Petition, challenging the sufficiency of the allegations thereof (R. 6). On February 23, 1945, the day set for the hearing, a written motion was filed by the Attorney for the Petitioner in the Probate Court, (R. 7), that the hearing of the cause be continued and held in abeyance until three months after the termination of the services

of the Petitioner in the armed forces, based upon the general statement that Petitioner had a short time back returned from overseas duty, that he was then temporarily stationed in Washington, D. C., but that, due to his service in the army, his ability to prosecute his said suit was and would be materially affected.

By order of February 23, 1945, (R. 8), the Probate Court, after sustaining the demurrers to the Petition, granted the Petitioner twenty days within which to amend, at the same time denying the Petitioner's motion to have the entire cause held in abeyance until three months after the termination of his services in the army.

On March 14, 1945, an amendment to the Petition, signed and sworn to by the Petitioner himself, was filed in the Probate Court (R. 10). This amendment alleged merely that the will, alleged to be lost, was at one time retained by the Attorney for the Decedent, William C. Martin; that it was at one time with the personal papers of the said decedent and that it was then removed to a box or vault of the decedent at the bank; that the said decedent before his death stated to the Petitioner that the will was in existence, "duly executed", and that decedent discussed the contents with the Petitioner. This amendment, however, failed, as did the original Petition, to set forth the names of both of the alleged subscribing witnesses, to otherwise identify them, or to show an excuse for failure to do so.

While the oath of the Petitioner to the amendment is omitted in the printed Record, the original Record shows that it was taken *before a Notary Public in Jefferson County, Alabama*. In other words, the Petitioner on March 14, 1945, at the time the amendment was filed, was not in Washington, D. C., but was evidently physi-

cally present in Jefferson County, Alabama, doubtless on leave.

On the same day, March 14, 1945, there was filed in the Probate Court an affidavit of the Petitioner himself, also before a Notary Public of Jefferson County, Alabama, as shown by the original Record, which moves the Court "to continue the hearing of this cause and that the same be held in abeyance until three months after the services of the affiant, the Petitioner in the said cause, in the armed services is terminated". This is supported only by a general statement that Petitioner is in the armed services and "unable to properly prosecute the said cause" (R. 8).

On the same day, March 14, 1945, the Probate Court entered an order (R. 10) setting both the motion to continue the hearing, and the amended petition, for a hearing on the 30th day of March, 1945.

Either on March 14, 1945 or at some time thereafter and on or before March 30, the Attorney for the Petitioner filed "Petitioner's Objection to Further Action" (R. 11) in which it was stated in behalf of Petitioner that Petitioner objected to any further action in the cause and that any further action would be highly prejudicial to his rights.

On March 30, 1945, the day on which the final order dismissing the Petition was made after Petitioner's Attorney declined to proceed or plead further, the Attorney for the Petitioner filed what he designated as "Petitioner's Reply to Court's Invitation to Proceed Further", (R. 11). Believing it to be significant, we herewith set it forth in full:

"Now comes said petitioner by his atty. and after

the Court over his objection has permitted the re-filing of respondent's demurrers to the Petitioner's amended Petition, as amended on March 14, 1945, and after the Court over Petitioner's objection has ruled upon same sustaining said demurrer's; the Court thereupon called upon Petitioner's attorney in open Court to state *whether or not he desired to plead further, or whether or not Petitioner desired further time within which to amend or plead further*, and Petitioner's said attorney answered in reply that because of the absence of Petitioner in the armed services of his country Petitioner was and is unable to amend or proceed further in said cause at this time." (Emphasis ours)

The opinion of the Supreme Court of Alabama (rendered upon an appeal by Petitioner from the Probate Court's order of March 30, 1945, and affirming the order of the Probate Court), in construing the nature of the order of the Probate Court made upon Petitioner's Attorney's declining to plead further, states in part as follows:

"The Petitioner was represented by able counsel and the cause never progressed beyond the state of pleading prior to trial. The case was never set for hearing on its merits. The Court did not pass upon the question as to whether or not trial upon the merits would be stayed. The Court merely required, with attorney in court a proper petition. But further pleading was declined." (R, 23)

The foregoing statement of the case is made with a view toward outlining briefly, from the standpoint of Respondent, Mrs. Wagner, the nature of the motions of Petitioner to continue the entire proceeding under the Soldiers' and Sailors' Civil Relief Act, and toward em-

phasizing that the order of the Probate Court denying a general stay of the proceedings did not compel Petitioner to proceed at the time to a hearing on the merits, but required him merely to file a proper and legal Petition.

In this statement no mention is made of any portion of the Record before the Supreme Court of Alabama and the Probate Court of Jefferson County, Alabama, in a proceeding brought by Dan S. Martin, Sr., father of the Petitioner, to Probate an alleged lost will of the same decedent, William C. Martin. We deem it proper, however, to make brief reference to the facts set up in the Respondent's motion to correct a diminution of the record in this cause, in a separate section at the end of this brief, entitled "Argument in Support of Respondent's Motion for Certiorari to Correct a Diminution of the Record."

## ARGUMENT

Respondent is confident that when the decision of the Trial Court in this case, the Probate Court of Jefferson County, Alabama, and of the Supreme Court of Alabama are viewed in the light of the principles established in *Boone v. Lightner, et al*, 319 U. S. 561; 63 S. Ct. 1223, the final judgment of the Supreme Court of Alabama will not be disturbed by this Court.

The first principle is that a mere showing that a plaintiff or defendant in the military service (defendant in that case) is in Washington does not render a stay or continuance mandatory, the legislative history of the antecedent of the Soldiers' and Sailors' Civil Relief Act of 1940 showing that judicial discretion conferred on the Trial Court by Section 201 of the Act instead of

rigid and indiscriminating suspension of civil proceedings is the very heart and policy of the act.

As we read the Petitioner's brief, he does not dispute this principle, and accordingly we proceed to what we conceive to be the second principle involved, that dealing with the burden of proof under Section 201. With reference to that, this Court says:

"The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its good policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come. One case may turn on an issue of fact as to which the party is an important witness, where it only appears that he is in service at a remote place or at a place unknown. The next may involve an accident caused by one of his family using his car with his permission, which he did not witness, and as to which he is fully covered by insurance. Such a nominal defendant's absence in military service in Washington might be urged by the insurance company, the real defendant, as ground for deferring trial until after the war. To say that the mere fact of a party's military service has the same significance on burden of persuasion in the two contexts would be put into the Act through a burden of proof theory the rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary. We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with

facts needful to a fair judgment." (P. 1228, 1229 63 S. Ct.)

We, therefore, take it as settled that a sound discretion vests in the Trial Court, whether state or federal, not only in determining the ultimate question whether the cause should be stayed because of the military service of one of the parties, but also in determining the procedure by which the ultimate question shall be settled, that is, whether the burden should be placed upon the party in the military service affirmatively to show that absence because of such service materially impaired his ability to prosecute or defend, or whether the burden should be placed upon his opponent to establish the contrary.

With that principle in view, a vital inquiry in this case is: did the Probate Court of Jefferson County have the right in the exercise of its discretion, to look to the Petitioner to come forward with facts excusing the Petitioner from making any effort while he was in the army to plead further in the cause, in order that the Court might ascertain whether he had a cause of action, and, if so, did the Petitioner make a sufficient showing in that regard?

We have stated the question in the above phraseology because we believe that the proceedings in this case clearly demonstrate that the Trial Court neither required that the Petitioner proceed to a hearing on the merits on March 30, 1945 (the day on which the order of which Petitioner complains was made), nor even that he submit a final amendment to his Petition on that day. As proof of this, nothing further is needed than the written statement filed by Petitioner's own Attorney entitled "Petitioner's Reply to Court's Invitation to Proceed Further" (R. 11),

which, after outlining that the Court had over Petitioner's objection permitted the refile of Respondent's demurrers to the Petitioner's amended Petition, and had over a similar objection sustained the demurrers thereto, stated in part as follows:

"the Court thereupon called upon Petitioner's Attorney in open Court to state whether or not he desired to plead further, *or whether or not Petitioner desired further time within which to amend or plead further*, and Petitioner's said attorney answered in reply that because of the absence of Petitioner in the armed services of his country, Petitioner was and is unable to amend or proceed further in said cause at this time." (Emphasis ours)

In characterizing the hearing of March 30, 1945, and the final order of the Probate Court made that day, as relating not to a trial on the merits but only to the sufficiency of the Petition as a matter of pleading, the Supreme Court of Alabama in its opinion used the following language:

"The Petitioner was represented by able counsel and cause never progressed beyond the state of pleading prior to trial. The case was never set for hearing on its merits. The Court did not pass upon the question as to whether or not trial upon the merits would be stayed. The Court merely required, with the attorney in court a proper petition. But further pleading was declined."

Since there is nothing in the record to indicate the contrary, this construction of the procedure of the Probate Court and the nature of its order should be accepted as conclusive.

While the Alabama Supreme Court did not specifi-

cally refer to the fact that the Probate Court called further upon Petitioner's Attorney to state whether or not he desired further time within which to amend or plead further, this is evidenced by the Attorney's own statement in the record itself. It is thereby affirmatively indicated that the Probate Court did not foreclose the seeking by Petitioner's Attorney of further time within which to amend and if need be to communicate with the Petitioner in Washington or with the Petitioner's father and agent, who was presumably in Birmingham, if he so desired, for that purpose.

Therefore, the most that the Petitioner can complain of in this case is that the Trial Court required of him a reasonable effort to state by preliminary pleading sufficient facts to constitute a cause of action, instead of acceding to his Attorney's arbitrary demand to do nothing whatsoever until three months after the termination of Petitioner's military service. When on March 30, 1945, the court inquired of the Petitioner's Attorney whether he wished further time in which to amend, Mr. Pettus, his Attorney, elected not to communicate further with his client to determine whether he had or could obtain further information to supply the defect in the Petition, but by declining to make an effort to plead further or to proceed in any manner, chose to stand on what he evidently conceived to be his client's absolute right not to be required to take any step whatsoever in the case until such time as his military service should end. His client, we submit, had no such right.

The vital defect in the Petition, according to the holding of the State Supreme Court, lay in the fact that the allegations thereof failed to disclose the names of both of the alleged subscribing witnesses to the alleged

lost will or a valid reason for the failure to give such information. While the name of one of the subscribing witnesses was alleged to be Val J. Nesbitt, Attorney for the Decedent, W. C. Martin, (Petition, R. 2), no mention was made of the name or identity of the other. While it is true, as pointed out in the Supreme Court opinion, that on a hearing on the merits the testimony of a single witness might be sufficient proof of the substance of a lost will and of the facts essential to a valid execution, such as the attestation by at least two witnesses subscribing their names to the instrument in the presence of the testator, all these essential facts must nevertheless be alleged as well as proved.

Thus, although it is conceivable that in a rare case the names of one or more of the subscribing witnesses would not be known to any of the persons attempting to testify concerning the execution of the lost will, as a matter of pleading the existence of circumstances making it impossible to name both of the attesting witnesses must be set forth, as the State Supreme Court held.

The Petitioner's Attorney intimates in the Petition for Certiorari that, according to the decisions of the Supreme Court of Alabama rendered prior to the instant case, the Petition was legally sufficient. We disagree, but do not think it material to any issue involved here. Suffice it to say that the State Supreme Court's decision in this case on that point, involving as it does purely a question of local law, is now controlling. It is elementary that with the decision of the state court on such a point, this Court will decline to interfere.

Let us then outline the circumstances prevailing at the time of the entry of the Probate's order of dismissal of March 30, 1945, as shown by the record and the opinion

of the State Supreme Court, without regard to the additional circumstances detailed in the motion for certiorari to correct a diminution of the record filed by the respondent:

William C. Martin, the alleged testator, died July 18, 1940, leaving a widow, Zoe R. Martin, and two brothers (one of whom was Dan S. Martin, Sr., father of the Petitioner), as his next of kin and heirs at law under the laws of descent and distribution of the State of Alabama. Petitioner would have no interest in the estate in the absence of a will making provision for him.<sup>1</sup>

Prior to the death of Zoe R. Martin, Dan S. Martin, Petitioner's father, filed a Petition to Probate the Alleged Lost Will of William C. Martin, deceased, and took an appeal from the final judgment or decree of the Probate Court of Jefferson County, the same court as in this proceeding, denying, disallowing and dismissing the Petition.

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<sup>1</sup>. Under Alabama law the real estate of a person dying intestate descends, if there are no children or their descendants, and no surviving parents, to the brothers and sisters of the intestate or their descendants, in equal parts, in preference to the widow; Title 16, Section 1, Ala. Code of 1940. The widow, however, under Title 34, Section 40 et seq., has a dower interest in the real estate of the intestate. The personal property of the intestate descends under such conditions to the widow in preference to brothers and sisters; Section 10, Title 16. Nieces and nephews who are children of surviving brothers and sisters of the decedent take neither real nor personal property from the estate of decedent under any conditions except through a will. The widow during her lifetime, and her estate after her death, may in all cases dissent from the will and take that portion of the estate to

This appeal was dismissed by agreement April 12, 1943, almost two years before the filing of the present proceeding. The Attorney for the Petitioner in this case is the same attorney who represented Dan S. Martin, the father, in his proceeding. The foregoing facts set out in this paragraph are taken almost verbatim from the penultimate paragraph of the State Supreme Court opinion in this case. (R. 23). The Supreme Court citing *Catts v. Phillips*, 217 Ala. 488; 117 So 34, impliedly adopted the record of the Petition of Dan S. Martin, Sr., we say, as a part of the record in this cause. *Catts vs. Phillips, supra*, deals with the principle of the taking of judicial notice of the record of another case in the same court in appropriate cases, and in citing it the Supreme Court undoubtedly meant to be understood as taking judicial notice of the Petition of Dan S. Martin, Sr., and as authorizing the Probate Court below, in which both proceedings originated and were tried, to do likewise. We therefore think that the statement made by the Supreme Court relative to the proceeding of Dan S. Martin, Sr. should be considered a part of the record in this case, without regard to the motion to correct a diminution.

After the Probate Court on February 23, 1945 overruled the motion of Petitioner in this case to hold the cause in abeyance until after the termination of his military service and sustained the demurrers to the Petition because of the failure to identify the subscribing witnesses, the Petitioner on March 14, 1945, after being granted

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which she would have been entitled in cases of intestacy, (subject to a limitation that if there are no children the dissenting widow may take the personal estate only to the extent of \$50,000 in value, the excess being distributed as provided in the will); Title 61, Section 18 to 21, inclusive, Ala. Code of 1940.

twenty days for that purpose, filed an amendment which he himself verified *before a Notary Public in Jefferson County, Alabama*. (R. 10, Jurat omitted in printing, but shown in the original record on file). This amendment contained no additional allegation whatsoever concerning the names or identities of the subscribing witnesses and thus failed to cure the substantial defect in the original Petition. Except for allegations concerning the temporary location of the alleged lost will, the only averment of the amendment was that the alleged testator before his death stated to Petitioner that the said will was in existence and discussed the contents thereof with the Petitioner.

Thus, the second proceeding to probate an alleged lost will was filed almost five years after the death of W. C. Martin and after the Petitioner, according to his affidavit, acquired information of the existence of such a will.

We thus may assume that the Probate Court, having entertained and dismissed one proceeding involving the attempted establishment of an alleged lost will of the same decedent,<sup>1</sup> was interested in ascertaining at the earliest practicable time, before deciding to hold the entire proceeding in abeyance for the duration of the military service of Petitioner and thereby to delay indefinitely the administration of the decedent's estate, whether the Petitioner, or Petitioner's father, or their able attorney, had actually acquired over a period of nearly five years, sufficient information upon which to base a claim that there

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<sup>1</sup>. While we maintain that the Alabama Supreme Court's comment pertaining to the filing of the previous Petition of Dan S. Martin, Sr. should be taken into consideration, we think that this fact,

was a validly executed and attested will under which the Petitioner, who otherwise had no interest whatsoever in the estate, was a beneficiary.

While the record now before the Court does not disclose that during the period of almost five years since the death of the decedent an executor or administrator of his estate had already been appointed,<sup>1</sup> it is reasonable to assume that the estate was being administered, and also to assume that the Judge of Probate had acquired knowledge of the condition and value of the assets thereof. By section 96, Title 61, Alabama Code of 1940, the amount of the bond required to be given by an administrator and to be approved by the Judge of Probate, is fixed as to amount by the estimated value of the real and personal property of the estate. By Section 189, same Title, every administrator must file an inventory of the personal property, upon the filing of which the Probate Court must, by Section 193, effect an appraisal of the value of the personal property. In any event, the Probate Judge is presumed to be acquainted in some degree with the property

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<sup>1</sup>. The record of the proceeding of Dan S. Martin, Sr., the father, as shown by the demurrer to the Petition according to the motion to correct the diminution of the record in this cause, discloses that Mrs. Zoe R. Martin was appointed administratrix of the estate of William C. Martin, deceased.

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known to the Probate Court at the time, is only an additional circumstance, the absence or exclusion of which would not have affected the Probate Court's right to adjudge whether the Petitioner should forthwith be required to file a legal Petition or whether the filing thereof should be postponed until after the termination of his military service.

of the estate. Therefore, for aught appearing in this case, the Judge of Probate considered it his duty, having due regard to the rights of the widow and of her estate after her decease, to require some showing by way of pleading of the Petitioner that there was sufficient merit in his claim to warrant any prolonged suspension of the administration of the estate, necessarily resulting from a holding of the entire proceeding in abeyance. The Probate Judge doubtless entertained a scrupulous and conscientious concern over the possible effect upon the corpus of the estate and the value of the interest of the widow therein of an indefinite delay in administration. If there was any reasonable expectation that a lost will would be established such a delay would, of course, be necessary; but if there were not sufficient facts in possession of Petitioner after so long a time to enable the preparation of a legal Petition, the question of such a reasonable prospect would be remote. Hence, the Court was charged with the sacred responsibility of meting out a fair and impartial judgment by giving due consideration not only to the rights of the Petitioner, but to the rights of others as well.

The fact alleged in the amendment to the Petition that the decedent stated to the Petitioner that there was a will would not, if proven, be sufficient for the establishment or probate of the alleged lost instrument as the will of the deceased, as the State Supreme Court held.<sup>1</sup>

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<sup>1</sup>. (r.p. 21, 22) "We do not consider that the allegation 'that the decedent before his death stated to your petitioner that the said will was in existence duly executed and discussed the contents of the same with petitioner,' makes the pleading good. It does not meet the defect which we have discussed, because the parties are entitled

If the Petitioner had acquired no more information than that, he could, of course, not proceed and the Probate Court thus declared in the order of March 30, 1945, in denying the motion to continue all steps of the proceeding indefinitely, that the Petitioner and movant was not shown to have any interest in the matter alleged "by reason of the fact that nothing in the record shows the existence or loss of any valid will". Undoubtedly the court meant thereby that, the Petitioner having no status as next of kin of the decedent and having failed to allege sufficient facts which if true would establish a will making him a legatee, for aught appearing had no interest whatsoever in the estate involved.

On March 14, 1945, after the Court had put the Petitioner's Attorney on notice that sufficient facts were not alleged and given him ample time within which to obtain any further information in the possession of his client, Petitioner was, as stated, undoubtedly present in person in Jefferson County for a personal conference with

*his Attorney.*

The fact of his presence in Jefferson County is evidenced not only by the jurat in the unprinted record filed in this Court, but also by the following portion of the opinion of the Supreme Court of Alabama: (R. 23)

"The record shows that petitioner was at the time stationed within the United States and after the

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to know, if possible, the alleged witnesses, so they may interview the witnesses so as to reach their own conclusion as to the due execution of the will. Besides the allegation at its best merely presents evidentiary matter which from the standpoint of pleading will be regarded as surplusage.—*Buettner Bros. v. Good Hope Missionary Baptist Church et al*, 245 Ala. 553, 18 So. (2d) 75."

court had sustained the demurrer to his petition upon the ground of his failure to set forth the names of the alleged witnesses or valid excuse for failure to do so, petitioner made an affidavit in Jefferson County confirming the acts of his attorney and invoking the Soldier's and Sailors' Civil Relief Act in connection with an amendment to the petition which he signed. The amendment to the petition also failed to give the name of the other witness to the alleged will or valid excuse for such failure."

Under such circumstances (of which of course the Probate Court was cognizant at the time of its order of March 30) Petitioner could have supplied the name of the other subscribing witness, if he knew it, or could have directed the attention of his Attorney to any knowledge that he had which might relate to the naming or identifying of such witness, having had almost five years within which to obtain such information. If the Petitioner, his father, family and attorney had not over the long period since the death of William C. Martin, marshalled enough information in order to supply the vital defect in the Petition and in his case, the Court's natural inquiries would be: Would such information ever be acquired? How much longer should the Petitioner with the aid of his able Attorney be allowed? Should any person, soldier or civilian, who filed a suit or proceeding without actually being able to allege sufficient facts to constitute a cause of action be given an indefinite period within which to go on a fishing expedition?<sup>1</sup> Should he not have a case before he files suit?

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<sup>1</sup>. While under Section 34, Title 61, Ala. Code of 1940, there is limitation of five years from the death of the testator within which a will may be filed for Probate, this period of limitation like all others is suspended, we

Should he not, before being allowed to claim that his ability to prosecute a suit is impaired by absence in the military service, first show that he has a suit capable of prosecution?

Whatever information Petitioner had, his ability to make it available to his Attorney for allegation in the Petition was certainly not impaired. Even had it been shown to the Court that he was not given an opportunity to visit his home (which, of course, he did) the Court needed no proof that he was perfectly free to correspond with his Attorney from Washington. In fact, any attempted proof to the contrary would have necessarily been *fantastic*.

It seems to us that, if and when a proper Petition had been filed by Petitioner's Attorney, then and then only could the question have arisen whether his ability to prosecute his suit was impaired. If, when approaching trial on the merits, his aid was needed in preparing the case, all questions relating thereto, such as whether sufficient furlough or leave of absence before and during the time set for hearing could be obtained from the Commanding Officer of the Petitioner, might be squarely and frankly presented to the Court by the Petitioner's Attorney at that time. This would also be true as to any question pertaining to the time for the taking of his testimony, if he had personal knowledge of any material facts, or of his presence for the trial.

The point at which such questions might have arisen

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believe, as to any prospective proponent during the period of his military service, under the provisions of Section 525, Title 50, Appendix, USC, Soldiers' and Sailors' Civil Relief Act.

was never reached in this case. The only possible question, with reference to any impairment of the ability of the Petitioner to prosecute his suit, was whether his absence in Washington precluded him from furnishing his Attorney information. That question before the Court would answer itself, and the answer would be self-proving, without the necessity of determining upon whom should be the burden of proof.

Even if it be imagined that the Petitioner had possession of information which though insufficient in itself might lead to the discovery of sufficient evidence of facts to establish his case, the natural assumption is that his Attorney, in the absence of Petitioner, would be well able to trace and develop the source of such information.

In the case involved here, there could hardly have been presented an issue of fact as to any impairment of the Petitioner's ability to proceed. Even had the statute placed upon the opposing party the burden of proving in all cases the lack of material impairment as a result of absence in the military service, the decision of the Probate Court in demanding of Petitioner's Attorney a reasonably diligent effort to submit an adequate Petition would have been perfectly justified. On that issue the absence of the Petitioner in Washington would be immaterial and the suggestion in *Boone v. Lightner, supra*, "absence when one's rights or liabilities are being adjudged are usually prima facie prejudicial", would be entirely inapplicable. However, if upon any theory there could have been any question of fact concerning the effect of Petitioner's absence in Washington upon the ability of his Attorney to file a proper pleading, there would have been by no stretch of the imagination an abuse of discretion by the Probate Court in placing such a burden

upon Petitioner. Under the circumstances of this case, the logical inference would be strongly against any impairment of ability to prosecute up to that point.

We, therefore, inquire: Why did not Petitioner's Attorney instead of taking a rigid stand that the Court had no right to proceed even to the point of hearing on demurrer because of his client's invoking the Soldiers' and Sailors' Civil Relief Act, make a full and fair disclosure to the Court of any facts or circumstances which he conceived as impairing the ability to write a legal Petition? Why did he not tell the Court, for example, the reason for knowing the name of one subscribing witness, Val J. Nesbitt, and not knowing the name of the other; that is, why the source of information concerning the one did not naturally lead to the identification of the other? Instead of his making a general statement by way of conclusion (and having his client do the same by affidavit) that the ability of the Petitioner to prosecute was materially impaired or affected, why did he not explain in full and in detail that during the presence of Petitioner in Jefferson County, Alabama on March 14, 1945, there was not a thorough opportunity to assemble the information necessary to cure the defect in the original Petition if available at all? He contented himself, even upon inquiry by the Court on March 30 whether he desired further time within which to amend or plead further, merely to assume and maintain an obstinate position that "because of the absence of the Petitioner in the armed services of his country, Petitioner was and is unable to amend or proceed further in said cause at the time" (R. 11).

If the terms of the statute precluded a Court in all cases from asking the soldier or sailor "to come forward with facts needful to a fair judgment", another principle

established in *Boone v. Lightner*, supra would be fatal to the Petitioner in this case. It is explained in the following language:

"Regardless of whether defendant was under a duty to make a disclosure of his situation, once he undertook to do so, the significance alike of what his affidavit said and of what it omitted was to be judged by ordinary tests. One of these is that 'all evidence . . . is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted' ". (1229, 63 S. Ct.)

None of the affidavits submitted by the Petitioner, including those he made personally and the one made by his father, purported to set forth any facts, unless the bare generality that "the Petitioner's ability to prosecute his said suit is materially affected by his military service" (R. 9) can be considered a statement of fact.

In conclusion, we submit that the logic of the decision of the Supreme Court of Alabama that the Probate Court did not abuse its discretion in requiring Petitioner "to plead further or the cause be dismissed" is not subject to successful attack on any theory whatsoever. If there was ever a case which justified the denial of a stay under the Soldiers' and Sailors' Civil Relief Act, the case involved here is in that category, in our opinion.

Respectfully submitted,  
James A. Simpson,  
*Attorney for Respondent*

Mrs. Esther R. Wagner, as Executrix of the Estate of Zoe R. Martin, Deceased, and Individually.

Smyer and Smyer,  
Lange, Simpson, Robinson and Somerville, of Counsel.

ARGUMENT IN SUPPORT OF RESPONDENT'S  
MOTION FOR CERTIORARI TO CORRECT  
A DIMINUTION OF THE RECORD.

The contention of the Respondent that the Supreme Court of Alabama took judicial notice of the Record of the Petition and proceeding of Dan S. Martin, father of Dan S. Martin, Jr., to probate an alleged lost will of the same decedent, William C. Martin, is heretofore set forth in this brief, and no further discussion of the point is made here, except to say that, in our opinion, the Supreme Court of Alabama, citing *Catts v. Phillips*, 217 Ala. 488, 117 So. 34, adopted and gave consideration to the Record of that proceeding as a part of the Record in the case of Dan S. Martin, Jr.

The Petition of Dan S. Martin, Sr. was filed on the 6th of August, 1942, over two years after the death of the decedent, William C. Martin.

The substance of the alleged lost will made the subject matter of that Petition is entirely different from that of the will sought to be established by Dan S. Martin, Jr. Dan S. Martin, in his Petition, averred that twenty-five per cent of the estate of the decedent, his brother, was willed to him; that the remaining seventy-five per cent was left by the alleged lost will to the widow, Zoe R. Martin, for her lifetime, and that after her death it was to be divided "among the heirs at law of the said testator, William C. Martin". In the Petition he names the heirs of the decedent as Zoe R. Martin, the widow, John D. Martin, another brother of the decedent, and himself. He supported this Petition by his own affidavit. It is significant that the will sought to be established by him in August, 1942, made no provision whatsoever for Dan

S. Martin, Jr. or any of the nieces and nephews of the decedent. It is also significant that the affidavit which he made in support of the Petition of Dan S. Martin, Jr., upon knowledge, information and belief, constitutes an oath to entirely different facts.

The solemn oath which he took in August, 1942, was made by him despite the fact that, if the affidavit made by Dan S. Martin, Jr. to the amendment to his Petition, filed on March 14, 1945, is to be accepted as true, the decedent before his death in July, 1940 had informed his own son, Dan S. Martin, Jr. that the will made the decedent's nephews and nieces the beneficiaries of the remainder interest in all the personal property.

If Dan S. Martin, Sr. himself saw the will and thereby knew its contents, he could, of course, have easily supplied the names of the subscribing witnesses thereto and cured any possible defect in his own Petition as well as that of Dan S. Martin, Jr. (the defect was the same in each). If he had no personal knowledge of the execution or contents of any will made by the decedent, then naturally his allegations and the affidavits that he made in support of both Petitions were necessarily upon information and belief. However, in any case the Judge of Probate, who had considered both Petitions, must have thought it remarkable that the information which he had in August, 1942, over two years after the death of William C. Martin, was entirely at variance with the information to which he made oath on January 15, 1945. Did the son, Dan S. Martin, Jr., during the period of over two years

intervening between the death of the decedent and the filing of the first Petition ever communicate to his father the substance of the solemn and important conversation between the decedent and the son prior to the decedent's death, in which the decedent disclosed that the son was to be one of the objects of his generosity? If he did not communicate such impressive information, then what was the cause or reason for his failure ever to acquaint his father with that fact? If he did communicate the result of the decedent's conversation to his father, then what is the explanation for the father's version of the contents of the alleged will set out in the Petition of August, 1942? Is it not strange that after the dismissal of the father's Petition by agreement on April 12, 1943, presumably after a satisfactory arrangement had been made with him in disposing of his claim, an entirely new claim should be presented in the name of the son? Those are questions which must have been in the mind of the Judge of Probate when he sought to determine in March, 1945, whether Dan S. Martin, Jr., his family and Attorney actually had knowledge and information upon which to base sufficient allegations (and consequent proof) of the contents and valid execution of a lost will of William C. Martin.

This circumstance upon which we shall no longer dwell, among many others, made it natural for the Probate Court in the exercise of a sound judicial discretion to look to the Petitioner "to come forward with facts needful to a fair judgment" (*Boone v. Lightner*, *supra*,

P. 1229, 63 S. Ct.) in determining whether Petitioner should be required at the outset to allege in his pleading facts sufficient to establish a right of action. The pertinency of the record in the case of Dan S. Martin, Sr., is therefore respectfully suggested.

Respectfully submitted,

James A. Simpson,  
*Attorney for Respondent*

Mrs. Esther R. Wagner, as Executrix of the Estate of Zoe R. Martin, Deceased, and Individually.

Smyer and Smyer,  
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